Supreme Court, U.S.
FILED
JAN - 5 2000
OFFICE OF THE CLERK

No. 991197

IN THE

Supreme Court of the United States

Carl M. Spencer,

Petitioners,

v.

New York City Transit Authority, et al

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

Supplemental Appendix

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35pp

FILED

IN CLERKS OFFICE
U.S. DISTRICT COURT
E.D. N.Y. * JAN 19, 1999 *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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CARL M. SPENCER,

Plaintiff,

-against-

JUDGMENT
95-CV-4779 (JG)

NEW YORK CITY TRANSIT AUTHORITY and ALAN F. KIEPPER, PETER F. STANGT., CARMEN SUARDY, STUART LEWIS, and RONNIE SUE JAFFE, individually and in their official capacities as officers of the New York City Transit Authority,

Defendants.

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A memorandum and order of the Honorable John Gleeson, United States District Judge, having been filed on January 19, 1999, granting the defendants' motion for summary judgment; it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendants; and, that the defendants motion for surnrnary judgment is granted.

Dated: Brooklyn, New York
January 19, 1999

(SIGNED)
ROBERT C. HEINEMANN
Clerk of Court

UNITES STATES DISTRICT COURT

EASTERN DISTRtCT OF NEW YORK

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CARL M. SPENCER,

Plaintiff,

- against-

NEW YORK CITY TRANSIT AUTHORITY and ALAN F. KIEPPER, PETER F. STANGL, CARMEN SUARDY, STUART LEWIS, and RONNIE SUE JAFFE, individually and in their official capacities as officers of the New York City Transit Authority,

Defendants.

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FOR ONLINE PUBLICATION ONLY

MEMORANDUM AND ORDER

95-CV-4779 (JG)

APPEARANCES:

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By: Daniel Topper, Esq
Of Counsel
Attorneys for Defendants

JOHN GLEESON, United States District Judge:

Carl M. Spencer brings this action against his employer, the New York City Transit Authority ("TA"), and against former and current TA officials, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), 42 U.S.C. §§ 1981 and 1983, and Article I, § 12 of the New York Constitution, alleging race discrimination and retaliation and the deprivation by defendants under color of state law of plaintiff's rights guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The defendants now move for summary judgment. For the reasons stated below, their motion is granted.

FACTS

The TA operates the subway system in New York City. Plaintiff began working at the TA in July 1980 as a Road Car Inspector, the position he currently occupies. His job entails inspecting subway cars, making repairs on subway cars, and assessing whether they are safe for passenger service, often while the train is operating and carrying passengers. Because a Road Car Inspector's work is not subject to direct supervision or re-inspection, the TA has designated the position of Road Car Inspector as safety sensitive.

In the spring of 1990, the TA transferred the responsibility for welding disabled subway cars, known as over the road welding, to the Emergency Response Unit of Road Car Inspectors. To perform this

work, the TA trained those Road Car Inspectors who had selected Emergency Dispatch Vehicle positions rather than those, such as plaintiff, who had selected "gap station" positions. [1] Plaintiff, consequently, did not receive this training. Plaintiff contends, however, that he did not occupy a gap station position at that time, but was second in charge on an Emergency Dispatch Vehicle. According to plaintiff, despite his complaints to Joseph Sigona, a supervisor in the Division of Car Equipment, about not being selected for over the road welding training, the TA never offered this training to him. According to the TA, plaintiff never requested to attend training before March 1991, and no classes were available for incumbent Road Car Inspectors after December 1991.

On May 20, 1993, plaintiff filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging, among other things, that the TA had denied him over the road welding training and denied him overtime because of his race. The TA referred the complaint to the New York State Division of Human Rights ("SDHR").[2]

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[1] Gap stations are stations in between terminal stations.

[2] On February 14, 1995, the SDHR found no probable cause to support the allegation that the TA had discriminated against plaintiff. The EEOC issued plaintiff a right to sue notice on July 18, 1995. positive for cocaine. On July 23, 1994, the TA informed plaintiff of these results.

On July 6, 1994, plaintiff was selected for a random drug test in accordance with the terms of the collective bargaining agreement between his union, the Transit Workers Union of America Local 100 ("TWU"), and the TA, which allows for computer-generated random selections of saftey-sensitive employees for drug testing. At 6:00 in the morning that day, plaintiff submitted to the test. According to plaintiff, the tester did not ask him if he had taken anything that might interfere with the results. Plaintiff provided sufficient urine to fill a container and was unable to supply more than that initial specimen at that time. Consequently, according to plaintiff, he voluntarily waived giving a second sample for a confirmatory test.

The Metpath laboratory screened the TA's urine samples in July 1994. It performed on these samples a drug screening test called the Enzyme Mediate Imrnunoassy Technique ("EMIT"). For those samples that tested positive for the presence of drugs, Metpath performed a confirmatory test (on the Same sample) known as a Gas Chromatography-Mass Spectrometry ("GC-MS"). Metpath reported to the TA that plaintiff's urine specimen had tested positive for cocaine. On July 23, 1994, the TA informed plaintiff of these results.

On July 25, 1994, plaintiff reported to a Medical Review Officer ("'MRO"), who, according to plaintiff, asked plaintiff only to confirm his name, social security number, and pass number on the drug testing form Plaintiff then reported to labor relations John Nyire, the TA's labor relations representatives initially instituted disciplinary proceedings against plaintiff for violation of the TA's drug policy.

drug policy. Upon realizing that, under the collective bargaining agreement, a first-time positive from a random test did not rise to the level of an offense requiring discipline, Nyire suspended the disciplinary proceedings and sent plaintiff to the Employee Assistance Program (LEAPS) on a leave of absence, pursuant to the agreement. The agreement permitted plaintiff to use his accrued time and leave balances while at EAP.

Plaintiff entered EAP on July 26, 1994. As part of this program, on August 5, 1994, plaintiff enrolled in a ninety-day evaluation program at the Gracie Square Breakthrough Outpatient Clinic. Prior to this program's commencement, plaintiff signed a form advising him that the program required him to remain drug and alcohol free, refrain from using any substances, and submit to drug and alcohol screening every week. According to plaintiff, during his intake session at Gracie Square, he informed his counselor that he normally consumed alcohol on his days off.

Plaintiff submitted to twenty-seven drug tests during his time at Gracie Square, testing negative each time. On October 4, 1994, EAP recommended that plaintiff return to work, which he did sometime between October 16 and October 28. Plaintiff remained in the Breakthrough program after returning to work, and he remained subject to recheck testing for drugs and alcohol. On October 27, 1994, plaintiff missed an appointment with his Breakthrough counselor. According to plaintiff, he could not find a babysitter for his two-and-a-half year old daughter that day, so he contacted Gracie Square and

told people there he could not attend. The next day, October 28, 1994, plaintiffs Breakthrough counselor informed EAP Director Ronnie Jaffe, who was also plaintiff's EAP counselor, about his missed session. Jaffe then called plaintiff at home to inquire about his reason for missing the appointment. According to Jaffe, plaintiff sounded incoherent, angry, and hostile during the phone conversation. She believed him to be intoxicated. According to plaintiff, Jaffe screamed at him over the phone, prompting him to hang up on her.

Plaintiff met with Jaffe on October 31, 1994. At that meeting, Jaffe claims plaintiff told her that he occasionally consumed alcohol during his days off. Plaintiff contends that he never made that statement to her at ~~that~~ meeting, but had made it to his intake counselor when he enrolled at Gracie Square. Because plaintiff should not have been using drugs or alcohol at any time, Jaffe decided to accelerate plaintiffs TA recheck testing and to include alcohol testing as part of it.

On November 3, 1994, plaintiff completed his ninety-day Breakthrough evaluation program, though he remained in EAP and in treatment at Gracie Square. On November 20, 1994, as part of the TA's recheck testing, plaintiff submitted to a breath alcohol test. He claims that after he completed an initial test, the technician discarded the printed results over his objections. What plaintiff claims to be a second test administered that day revealed an alcohol level of .002 mgrn/cc, the minimal result necessary to require a blood alcohol test under the collective bargaining agreement. The technician asked

plaintiff to submit to a confirmatory blood test, which he refused to do. Plaintiff then signed a written refusal, acknowledging that his refusal could lead to his dismissal.

On November 21, 1994, plaintiff filed a complaint with the SDHR alleging that the TA had retaliated against him for filing his original complaint in May 1993 by, among other things, subjecting him to a random drug test on July 6, 1994, which yielded a positive result for the presence of cocaine He further claimed that the TA refused to retest him and forced him to attend rehabilitation for a problem he did not have.[3]

The TA brought disciplinary charges against plaintiff on November 23, 1994, for his refusal to submit to the blood alcohol test in violation of the collective bargaining agreement's alcohol policy. Under that policy, refusing to providB a blood sample is the equivalent of providing a positive alcohol test. At a Step II disciplinary hearing, the TA recommended plaintiffs terrnination, which he appealed. On December 1, 1994, the TA, plaintiff, and plaintiffs union entered into a settlement Stipulation and Agreement.

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[3] on February 22, 1995, soon after the SDHR issued its determination regarding plaintiff s initial claim, the SDHR found no probable cause to support the retaliation claim. The EEOC issued plaintiff right to sue notices with respect to both claims on July 18, 1995. On October 26, 1995, the Department of Justice issued plaintiff a right to sue letter with respect to the same claims.

which stated that plaintiff could be restored to his position upon EAP's recommendation and which released the TA from any claims arising out of the underlying dispute between the parties. Plaintiff claims that he had no choice but to sign the agreement, and did so under duress.

EAP put plaintiff back into the Breakthrough program. He tested positive for alcohol on January 23, 1995, and missed sessions on January 25 and 30, 1995. On February 3, 1995, plaintiff admitted to Jaffe that he drank on his birthday January 22. EAP recommended that he return to work on April 19, 1995. Upon his return to work on April 25, 1995, plaintiff remained in treatment and remained subject to TA's rechecking program for twelve months.

On July 4, 1995, in an TA recheck, plaintiff tested positive on a breath alcohol test, which a second breath test confirmed. Pursuant to federal regulations, the TA removed plaintiff from service for eight hours After being notified of this positive alcohol test, Jaffe, as EAP Directors recommended that plaintiff be removed from service. EAP, instead of removing plaintiff from the program, which would have resulted in his permanent dismissal, intensified his treatment at Breakthrough and warned plaintiff that any farther noncompliance would lead to his dismissal from EAP.

Plaintiff remained in compliance from July 7 through October 30? 1995, and returned to work on October 317 1995. He completed the Breakthrough program on January 11, 1996, and continued in TA

rechecking for the next twelve months.

On November 21, 1995, plaintiff initiated this action. Plaintiffs first attorney, Eileen Persky, conducted some discovery, including deposing two named defendants, Rormie Jaffe and Stuart Lewis, and an Emergency Response Unit supervisor, Joseph Sigona. According to plaintiff, Persky made demands for production of documents and served interrogatories on the defendants, but the TA refused to provide Persky with any regulations, directives, manuals, or guides for EAP employees and directors in response to plaintiffs interrogatory request #5. Before plaintiff could contest the TA's alleged refusal to produce these documents and conduct further discovery, Persky withdrew as plaintiffs counsel in June 1997. Plaintiff has secured counsel who purportedly represents him floor the sole purpose of responding to this summary judgment motion. Plaintiff still seeks counsel to represent him at trial and requests that the Court allow him to conduct further discovery.

At oral argument on December 4, 1998, the Court directed defendants to provide plaintiff with documents in response to plaintiffs interrogatory request #5. Defendants did so on December 8, 1998. On December 11, 1998, plaintiff submitted a supplemental memorandum in support of his request for additional discovery.

DISCUSSION

A. The Summary Judgment Standard

Courts must grant summary judgment where lithe pleadings, depositions answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether material facts are in dispute, courts must resolve all ambiguities and draw all inferences in favor of the non-moving party. See Kerzer v. Kinglv Mfu, 156 F.3d 396, 400 (2d Cir. 1998).

The moving party bears the initial burden of demonstrating the absence of anv genuine issues of material fact. see Gallo v. Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994). "When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986) (citations omitted). The non-moving party cannot survive a properly supported motion for summary judgment by resting on its pleadings "without offering 'any significant probative evidence tending to support the complaint.'" Anderson v. Liberty Lobby Inc., 477 U S. 242, 249 (1986) (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)).

B. The Plaintiffs Claim of Incomplete Discovery

Plaintiff claims that, because his original attorney withdrew from the case in June 1997, he was unable to complete discovery and, therefore, defendants' motion is premature. Federal Rule of Civil Procedure 56(f) states that when it appears that the party opposing a motion for summary judgment cannot "present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit . . . discovery to be had." The nonmoving party should not be "railroaded" into his offer of proof in opposition to summary judgment. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). That party must have "had the opportunity to discover information that is essential to his Opposition" to the motion. Liberty Lobby, 477 U.S. at 250 n.5. The trial court, on the other hand, may properly deny further discovery if the nonmoving party has had a fully adequate opportunity to conduct it. see First Natal Bank of Ariz. v. Cities Serv. Co., 391 U*S. 253, 290-99 (1968); Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 927-28 (2d Cir. 1985).

The Second Circuit has established a four-part test for determining whether to deny summary judgment based on the nonmoving party's claim of incomplete discovery. This test requires the nonrnoving party to file an affidavit explaining the following: "(1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the afflant has made to obtain them, and (4) why

the affiant was unsuccessful in those efforts." Hudson River Sloop Clearwater Inc. v. Department of the Navy, 891 F.2d 414, 422 (2d Cir. 1989) (citing Burlington, 769 F.2d at 926).

In this case, plaintiff filed his original complaint in November 1995 and an amended complaint in January 1996. Defendants filed their answer in February 1996. The Honorable Robert M. Levy, Magistrate Judge, originally set December 15, 1996, as the deadline to complete discovery. Plaintiff served interrogatories and document requests, to which defendants responded before the deadline. In a December 5, 1996 letter to Judge Levy, plaintiffs counsel, Eileen Persky, requested an enlargement of the discovery period to February 28, 1997, stating that the parties had 'completed their respective document productions which have been extensive, and complied with each others interrogatories." Defendant's Ex. 2. She sought only to conduct further depositions. Judge Levy granted the extension. Plaintiff deposed Ronnie Jaffe during this extension period.

At a status conference on March 12, 1997, plaintiff's counsel sought another extension to complete depositions. Consequently, Judge Levy set April 11, 1997 as the new deadline for completion of discovery and depositions. In addition, he scheduled June 16, 1997 as the date for a dispositive motion. Plaintiff deposed Joseph Sigona during this period.

During a June 13, 1997 status conference, plaintiff's attorney notified Judge Levy that she wanted to withdraw from the case for

health reasons. Judge Levy issued an order stating that fact discovery was complete and would be reopened only for good cause and staying further discovery until September 12, 1997, to enable plaintiff to obtain new counsel. Judge Levy adjourned the September 1997 conference when plaintiff failed to obtain new counsel .

On January 30, 1998, Eric Firestone, Esq., indicated he would represent plaintiff if he could obtain co-counsel. Judge Levy rescheduled the summary judgment motion to May 28, 1998. On March 2, 1998, Firestone stated that he would continue to assist plaintiff in finding counsel. Judge Levy again rescheduled the summary judgment motion, this time to June 15, 1998. By letter dated June 2, 1998, defendants' counsel requested a one-month extension to file its summary judgment motion, which the Court granted.

Based on this recorder even if plaintiff meets the first and second prongs of the Burlington test he cannot meet the third and fourth prongs. Plaintiff cannot establish that he made any efforts to obtain the discovery that he now seeks, nor can plaintiff demonstrate that defendant or his original counsel's withdrawal prevented him from conducting discovery. To the extent the TA refused to provide plaintiff with any regulations directives, manuals, or guides for EAP employees and directors in response to plaintiffs interrogatory, plaintiff had ample opportunity to move to compel compliance before his original counsel withdrew. In her letter of December 5, 1996, plaintiff's counsel stated that the parties had completed their respective document productions, failing to raise any issues of

noncompliance. Furtherrnore, Judge Levy stressed in his June 20, 1997 order, after plaintiffs counsel indicated she wanted to withdraw, that fact discovery was completed. Plaintiff cannot attribute his failure to earlier request the information he now seeks in his Rule 56(f) affidavit to his attorney's withdrawal when he had sufficient time to complete discovery before she withdrew.

Despite that, on December 4, 1998, I directed the TA to provide plaintiff documents in response to plaintiff's interrogatory request #5. The TA thereafter submitted to plaintiff the following: (1) eight memoranda from Ronnie Jaffet EAP clinical director, to EAP clinical staff, dated March 22, 1995 through November 30, 1995, explaining procedures to follow with respect to employees who may present dangers to themselves or the public, confidentiality, treatment protocols scheduling of clients, returns to work, a saliva based alcohol test, and the EAP chart room; (2) an April 2, 1995 memorandum from Robert Finch, EAP clinical manager, to EAP intake staff regarding required documentation for mandated clients; (3) a document titled "Brief History" that includes EAP's mission statement, goals, procedures, and intake policies; and (4) a December 4, 1989 memorandum from Robert Finch to Dr. Michael NIcKeraie, then clinical director of EAP, outlining Finch's philosophy of supervision

Plaintiff now asserts that defendants' refusal to produce these documents earlier prevented him from using them while deposing Ronnie Jaffe and Stuart Lewis. He does not explain, however, how these documents would have aided him in deposing these individuals

or how he might have gained more evidence in support of his claims against them. He further maintains that defendants have not complied fully with this Court's order, because they failed to provide memoranda, notes, guides, or manuals dealing with EAP procedures prior to 1995.[4] I find that defendants' submissions do comply with my December 4, 1998 order directing them to respond to plaintiff's interrogatory #5 seeking any regulations, directives, manuals, or guides for EAP employees and directors In none of plaintiffs papers before this Court is there any indication that he requested this information specifically with respect to EAP documents published before 1995. The documents the TA has furnished adequately respond to interrogatory #5, outlining EAP procedures for employees and directors as well as providing EAP's goals and general policies.

With regard to plaintiff's reiterated request for additional discovery, he has proffered no persuasive basis for the conclusion that further discovery will yield evidence that the TA targeted employees based on their race in selectively enforcing its random drug testing policy or that the TA violated its own procedures regarding the processing of positive drug test results, thereby rendering its drug

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[4] On December 31, 1998, the TA sent plaintiff additional documents, in further response to this Court's order, which Jaffe had discovered the previous day in a box that had been inadvertently mislabeled during renovations in the EAP offices. These documents consist of more memoranda from Finch and Jaffe, dated frorn October 1994 through June 1995, dealing with EAP policies.

testing unconstitutional. 'Rule 56(f) is not a shield against all summary Judgment motions. Litigants seeking relief under the rule must show that the material sought is germane to the defense, and that it is neither cumulative nor speculative," and a 'bare assertion that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." Paddinrton Partners v Bouchard, 34 F.3d 1 132, 1138 (2d Cir. 1994) (quoting Sundsvallsbanken v. Fondmetal. Inc., 624 F. Supp. 81 1, 815 (S.D.N.Y. 1985)). Plaintiff continues to maintain that the defendants violated ERAP protocol, thereby infringing his constitutional rights. He continues to avoid explaining, however, how further discovery would unearth any relevant information to support his allegation. Having failed to articulate what facts he seeks and how he will obtain them, and how he reasonably expects those facts to create a genuine issue of dispute for trial, plaintiff has not met the first two criteria of the Second Circuit's test for reopening discovery. See Hudson River Sloop Clearwater Inc. vP Department of the Navy, 891 F.2d 414, 422 (2d Cir. 1989) (citing Burlington, 769 F.2d at 926).

For these reasons, I deny plaintiffs request for further discovery.

C. The Constitutionality of TA's Drug and Alcohol Testing

In his memorandum opposing defendants' motion for summary judgment, plaintiff concedes that the TA has the authority to

conduct random drug tests of saftey-sensitive employees, and he admits that his position of Road Car Inspector makes him a saftey-sensitive employee. See Plaintiff s Mem. at 6, 8. What plaintiff challenges as unconstitutional are the TA's means of collecting and analyzing urine samples and the defendants' policies and actions with regard to plaintiffs urine sample, which tested positive for cocaine, and his subsequent alcohol test.

1. The July 6, 1994 Random Drug Test

On July 6, 1994, plaintiff submitted to a urinalysis for a random drug test. Furnishing enough urine for one sample, he was physically unable, he maintains, to provide enough urine for a second. He signed a written waiver of the taking of a second sample. Plaintiff claims that, had the TA informed him of the potential for false positives from a drug test, he would have remained at the testing site until he could produce sufficient urine for a second sample. In addition, plaintiff stresses that the technician administering the urinalysis did not inquire of plaintiff if he had taken anything that might interfere with the results. Plaintiff claims he had ingested tonic water prior to submitting his urine sample. According to plaintiff, the TA's failure to advise him of the alleged potential for false positives and failure to ask him if he had taken anything that could alter the test results violated his Fourth Amendment right to freedom from unreasonable searches and seizures.

The Fourth Amendment's prohibition against unreasonable

searches and seizures applies to searches and seizures authorized by the TA, an arm of the state and municipal governments. See Burka v. New York City Transit Auth., 739 F. Supp. 814, 819 (S.D.N.Y. 1990) (citing Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 614 (1989)). The testing of urine for drugs constitutes a search and, therefore, "must meet the reasonableness requirement of the Fourth Amendment." National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989). The reasonableness of a search turns on a balance between individual privacy interests and legitimate government interests. See Burka, 739 F. Supp. at 819 (citing Von Raab, 489 U.S. at 665, and Skinner, 489 U.S. at 614).

To determine the reasonableness of a search, courts have applied three standards: (1) probable cause; (2) reasonable suspicion, or "some quantum of individualized suspicion," Skinner, 489 U.S. at 624; and (3) reasonable in the absence of individualized suspicion, or "bare reasonableness." Burka, 739 F. Supp. at 827. The standard applicable in the Fourth Amendment analysis in this case derives from the standard courts have used when analogous private and government interests have been at stake. See Security and Law Enforcement Employees v. Carey, 737 F.2d 187, 204 (2d Cir. 1984); Burka, 739 F. Supp. at 827. In Von Raab and Skinner, the Supreme Court weighed the government/employer interest in preventing drug use in safety sensitive positions against the intrusion upon personal privacy effected by the taking of urine. It is proper here, therefore, to apply the same reasonableness standard that the Court used in those cases to determine whether the TA acted in a constitutional manner

when taking unne from plaintiff, who occupies a safety-sensitive position.

The TA's failure to advise plaintiff of the potential for false positives and failure to ask him if he had taken anything that could alter the results of his urinalysis did not render the drug test unreasonable under the Fourth Amendment. The uncontroverted evidence establishes that there does not exist any meaningful risk of a false positive reading for cocaine. Dr. Alan Genser7 Deputy Medical Director of the TA, stated in his affidavit that the Gas Chromatography- Mass Spectrometry ("GC-NIS") test, which the Metpath laboratory used to analyze plaintiff's urine sample, cannot produce a false positive result for cocaine. See Affidavit of Alan Genser ("Genser Aff.") at 3. Because plaintiff's urine sample tested positive for cocaine under an Enzyme Mediate Immunoassy Technique REMIT") test, the Metpath laboratory automatically performed the GC-MS test on the sarne sample. The combination of the EMIT screen and the GC-MS confirmatory test made the results cornpletely reliable. See id.

The only evidence plaintiff produced to counter Dr. Genser's affidavit actually supports it. Plaintiff bases his assertion that urinalyses can produce false positive results for the presence of cocaine on a pamphlet titled 'iDrug Testing on the Job, Know Your Rights," apparently published by the New York State AFL-CIO. The pamphlet urges workers to exercise their "rights with respect to "false positives" on employee drug tests. Plaintiff's Exam 7. It states that a

drug test could yield a false positive result for cocaine if the test taker has used tonic water, among other substances In that event, the pamphlet stresses, the test taker should demand to take "a confirmation test using 'Gas Chromatography-Mass Spectrophometry (GS-MS) [sic],'" which is "more accurate than the drug screening methods employed by most Companies Id. Based on plaintiffs own evidence, therefore, defendants followed the most reliable procedure available for analyzing his urine sample.

The TA thus had neither a reason nor an obligation to advise plaintiff of the potential for a false positive result of his urinalysis. By the same token, the TA had no reason to inquire of plaintiff if he had taken any substance that might alter the test results, since the GC MS test produces an accurate result no matter what substances or medications the test subject has ingested. Whether or not plaintiff drank tonic water or provided a second urine sample the day of his drug test is therefore irrelevant. Neither tonic water nor a second urine sample would have affected the outcome of the testing.

Plaintiff's challenge to the reasonableness of his drug test thus lacks any foundation. His own evidence only strengthens the defendants' argument. As the Supreme Court noted in Von Raab, "the combination of ENIIT and GC/MS tests . . . is highly accurate." 489 U.S. at 672 n.2. Because plaintiff has not raised any facts demonstrating that the TA's drug testing amounted to "arbitrary and oppressive interference with the privacy and personal security of individuals United States v. Martinez-Fuerte, 428 U.S 543, 554

(1976), which the Fourth Amendment was designed to prevent. I conclude that the TA's drug testing procedures met the reasonableness standard applicable in this case. Plaintiff was a safety-sensitive employee who knew, because of his union's agreement with his employer, that he was subject to random drug testing. Thus, there existed no "unsettling show of authority" that may be associated with unexpected intrusions on privacy. Delaware v. Prouse, 440 U.S. 648, 657 (1979). The TA examined plaintiff's urine sample only for specified drugs that could interfere with the safe operation of New York City's public transportation, not impinging on his privacy by testing for any other substances, and plaintiff did not have to disclose any personal information in providing his urine specimen. See Von Raab, 489 U.S. at 672 n.2. These measures, combined with the reliability of the test used to analyze plaintiff's urine sample, establish that the TA's drug testing exerted minimal interference with privacy interests, which, in this case, are so clearly outweighed by the governments interest in safety. See Burka, 730 F. Supp. at 830.

The random drug test that the TA administered to plaintiff on July 6, 1994, therefore, did not violate plaintiff's Fourth Amendment rights.

2. The July 25 1994 Meeting with the Medical Review Officer

Plaintiff met with Dr. Genser, in his role as Medical Review Officer ('MRO'), on July 25, 1994, in accordance with the TA's

standard practice of requiring employees who test positive for drugs or alcohol to meet with the MRO According to Genser, the purpose of the interview is to determine the reason for the positive result. See Genser Aff. at 1-2. Genser's typical practice involves asking every employee who has tested positive for drugs, including cocaine, about any medications used recent hospital stays, and any medical procedures undertaken. Genser's interview chart for plaintiff from July 25, 1994 indicates that plaintiff told Genser he was not taking any medications and that he denied any substance abuse. See id. at 2. According to plaintiff however, Genser failed to ask him questions about medications or medical history. Genser asked him only to verify his name, social security number, and pass number. For this reason, plaintiff asserts that the TA failed to follow its own policies, thereby denying plaintiff his Fourth Amendment right to freedom from unreasonable searches and seizures.

Whether or not Genser asked plaintiff about any medications he took prior to his drug test has no bearing on either the result or the constitutionality of that test. First of all, plaintiff does not claim to have been taking any medications at the time of his drug test. Second, as discussed above, neither medications nor any other substances can affect the outcome of the GC-MS test. see supra Part C. 1. Even if the TA had failed to follow its own procedures in the way plaintiff alleges, that would have no impact on the reasonableness of its testing procedures.

3. The TA's Failure to Provide Plaintiff a Hearing

Upon plaintiffs testing positive for cocaine on July 6, 1994~ the TA, pursuant to the collective bargaining agreement with plaintiffs unions placed him on an unpaid leave of absence and sent him to EAP for drug rehabilitation. Under the collective bargaining agreement, plaintiff was permitted to use his accrued leave balances while participating in the EAP program. According to plaintiff, the TA, without providing plaintiff a hearing, committed him to EAP involuntarily and denied him his property right in his wages, thereby violating the Fourteenth Amendment's guarantee of freedom from deprivation of liberty or property without due process.

It is firmly established in New York that unions may waive individual employees' constitutional rights, including due process requirements, through collective bargaining agreements. See Romano v. Canuteson, 1 1 F.3d 1 140,1 141 (2d Cir. 1 993); Grandi v. New York City Transit Auth., 977 F. Supp. 590, 595 (E.D.N.Y. 1997); Antinore v. State of New York, 371 N*Y-S.2d 213, 216 (4th Dep't 1975), affvd, 40 N.Y.2d 921 (1976). In Romano, the plaintiff maintained that "as a public employee, he had a right to be heard prior to suspension without pay and that this right could not be waived in a collective bargaining agreement." 11 F.3d at 1141. The Second Circuit rejected this argument, stating that "[o]ver a decade ago, New York State courts announced that due process requirements are not of controlling relevance if the party seeking to assert them has waived

them in a . . collective bargaining agreement Id. (citing Antinore 371 N.Y.S.2d at 216). Whether or not plaintiff actually signed the collective bargaining agreement or approves of the waiver is immaterial. See Antinore, 371 N.Y.S.2d at 217 ("The fact that this plaintiff did not himself approve the agreement negotiated by his representative and now disclaims satisfaction with one aspect of the agreement makes it no less binding upon him."). Plaintiff should raise any dissatisfaction with the agreement with his union, not with defendants. See Grandi, 977 F. Supp. at 595.

Plaintiff's union and the TA agreed to the drug testing policy in their collective bargaining agreement. Pursuant to that policy, the TA sent plaintiffto EAP without taking any disciplinary action. Because it took no disciplinary action, there was no need for a hearing. While attending EAP1 plaintiff received no regular wages, in accordance with the term, of the collective bargaining agreement. Plaintiff could have refused to enroll in LEAP, which would have resulted in the TOGA bringing disciplinary charges against him. At that point, plaintiff would have had access to the disciplinary grievance procedure outlined in the collective bargaining agreement. He then would have been afforded various hearings which may have led to arbitration. Plaintiff, however, opted to attend EAP. Because the TA followed the procedures agreed to in its contract with plaintiffs union, plaintiff cannot challenge these procedures as unconstitutional. Plaintiffs union, through the collective bargaining agreement, waived his right to contest the constitutionality of the drug testing policy.

4 The Events Surrounding Plaintiffs November 20 1994 Alcohol Test Plaintiff asserts that Rormie Jaffe's October 1, 1994 decision to test plaintiff for alcohol while he was enrolled in EAP amounted to an unconstitutional search and seizure. He further maintains that the TA's policy of conducting a confirmatory blood alcohol test following a breath alcohol test with positive results, such as plaintiff s November 20, 1994 breathalyzer, also violates the Fourth Amendment.

Plaintiff carmot challenge the constitutionality of either of these issues for the same reason just discussed in Part C.3., supra the EAP director's decision to test EAP members for alcohol as well as the methods of testing are included in the collective bargaining agreement between plaintiffs union and the TA. According to that agreement, 1 A employees attending EAP must remain free of any drugs or alcohol and are, consequently, subject to drug and alcohol testing during their period of enrollment. Ronnie Jaffe, as EAP director and as plaintiffs EAP counselor, therefore needed no particular reason to order alcohol testing for plaintiff while he was enrolled in EAP. In addition, the collective bargaining agreement specifies that employees enrolled in EAP who test positive for alcohol on a breath test—as did plaintiff on November 20, 1994—must submit to a blood test to confirm the results of the breathalyzer. Pursuant to the agreement, the TA treats the refusal to submit to a blood test as the equivalent of a positive result from it. The TA thus adhered to the procedures outlined in the collective bargaining

agreement in administering to plaintiff an alcohol test on November 20, 1994, and then requiring him to submit to a blood test after the breathalyzer produced positive results.[5] Because plaintiff's union negotiated the agreement, they waived his right to challenge the constitutionality of its provisions. See discussion supra Part C.3.

Furthermore, plaintiff signed an agreement waiving any right to bring claims against the TA based on any issue related to the November 20, 1994 alcohol test. Because plaintiff refused to submit to the confirmatory blood test after he tested positive for alcohol on the breath test, the TA brought disciplinary charges against him.

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5 Plaintiff's assertion that federal regulations do not permit confirmatory blood alcohol testing is incorrect. The Federal Transit Administration ("FTA") regulations, applicable to the TA beginning January 1, 1995, neither require nor prohibit blood alcohol testing. According to the FTA regulations, nothing in them "shall be construed to affect the authority of employers, or the rights of employees, with respect to the use or possession of alcoholic including authority and rights with respect to alcohol testing and rehabilitation." 49 C.F.R. § 654 1 1. These regulations do not alter the terms of the collective bargaining agreement between the TA and plaintiff's union calling for a confirmatory blood alcohol test. In any event, the FTA regulations could not affect plaintiff's November 20, 1994 testing, since they did not apply to the TA until January 1, 1995. See 49 C.F.R. § 654.15(a).

pursuant to the collective bargaining agreement. At a Step II disciplinary hearing, the TA recommended plaintiffs terrnination, which he appealed. On Decernber l, 19947 the TA, plaintiff, and plaintiffs union entered into a settlement Stipulation and Agreement, which stated that plaintiff could be restored to his position upon EAP's recommendation. The settlement also released the TA from any claims arising out of the underlying dispute between the parties.

Plaintiff maintains that he had no choice but to sign the agreement, and did so under duress. This assertion lacks any factual basis. Plaintiff had the option to proceed with his appeal, whereby he could have presented at arbitration his challenge to Jaffe's decision to test him for alcohol arld his challenge to the alcohol testing procedures. He chose, however, to avoid potential termination by continuing in EAP and by signing the waiver of any claims against the TA related to this matter. It was an attractive option, for it allowed him the opportunity to keep a job from which he arguably should have been fired more than once. He chose it in the presence of, and presumably with the assistance of, his union representative. Plaintiff has offered no facts supporting his conclusory assertion that the defendants coerced him into entering the agreement.

In any event, plaintiff cannot now challenge the constitutionality of the TA's alcohol testing procedures.

* * * *

For the foregoing reasons defendants' motion for summary judgment with respect to all of plaintiffs constitutional claims is granted.

D. The § 1983 Claim

Plaintiffs claim under 42 U*S.C. § 1983 relies upon the same constitutional challenges discussed above and upon his allegation that the TA applied its drug and alcohol policies to plaintiff selectively and arbitrarily. Because plaintiffs constitutional challenges fail, the § 1983 action based upon them must also fail. see Daniels v. Williams, 474 U.S. 327, 330 (1986) (stating that "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right"). In addition, plaintiff has alleged no fact that might suggest that defendants selectively or arbitranly enforced its policies against plaintiff. He has provided no evidence to counter defendants' evidence that, with respect to plaintiff, they followed EVA procedures to the letter. For this reason as well, plaintiff's § 1983 claim cannot survive summary judgment. See Scotto v. Almenas, 143 F.3d 105, 115 (2d Cir. 1998) (holding that, in § 1983 action, plaintiffs unsubstantiated speculation is insufficient to defeat summary judgment motion); Leon v. Murphy, 988 F.2d 303, 311 (2d Cir. 1993) (holding that plaintiff's allegations in § 1983 action cannot defeat summary judgment motion where "allegations are unsupported by any specifics, and many of them are flatly contradicted by the evidence proffered by defendant"). Defendants' motion for summary judgment with regard to plaintiffs § 1983 claim is therefore granted.

E. The § 1981 Claim

In plaintiff's complaint, he claims that the TA's alleged selective enforcement of its drug policy has an adverse impact on African-Arnerican employees in violation of 42 IJ.S.C. § 1981. Plaintiff has alleged nothing to support this claim. In his brief, plaintiff states that he "needs further discovery in order to present the court with proper affidavits and evidence to support his claim that the TA policy and procedures had an adverse impact on African Americans." Plaintiff's Mem. at 17. For reasons already stated, I have denied plaintiffs request for further discovery. See supra Part B. Because plaintiff has set forth no facts to justify his § 1981 claim, defendants' motion for summary judgment with respect to this claim is granted.

F. The Title VII Claim

Plaintiff alleges that the TA discriminated against him based on his race by not training him for over the road welding, by administering to him a random drug test, and by enrolling him in EAP, thereby violating Title VII of the Civil Rights Act of 1964, 42 U.S.C § 2000e et E (1998) ("Title VII"). In order to bring an action under Title VII, the plaintiff must file a timely charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), obtain a right to sue letter from the EEOC, and commence the lawsuit not more than ninety days after receipt of the letter. See Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir., 1994); 42 U.S.C. §§

2000e-5(e), (f).

On May 23, 1993, plaintiff filed a charge of discrimination with the EEOC. He filed a complaint with the New York State Division of Human Rights on November 21, 1994, alleging the TA had retaliated against him for filing his original complaint. On July 18, 1995, the EEOC dismissed both these charges and issued plaintiff a right to sue notice for each. The right to sue notices advised plaintiff that he had ninety days in which to file a lawsuit under Title VII. Plaintiff did not file this lawsuit, however, until November 211 1995, after the ninety-day period had expired. Consequently plaintiffs Title VII claim is time-barred. Plaintiff maintains that his claim is not time-barred because he filed it within ninety days of October 26, 1995, when he received a right to sue notice from the United States Attorney General Title VII's regulations, however, state that in cases where the respondent is a government or governmental agency, as in.this case, "the Commission [EEOC] will issue the notice of right to sue when there has been a dismissal of a charge. In all other cases where the respondent is a governrnent, governmental agency, or political subdivision, the Attorney General will issue the notice of right to sue ...." 29 C.F.R. § 1601.28(d). Because there was a dismissal of both charges in this case, the EEOC, not the Attorney General, remains the agency whose issuance of a right to sue notice triggers the commencement of the ninety-day period in which to file a lawsuit. Plaintiff's case does not fall into the category of"other" cases in which the ninety day period commences upon the Attorney General's issuance of a right to sue noticed. [6]

In any event, plaintiff has not met his initial burden under McDormell Douglas v. Greened 41 1 U.S. 792 (1973), of making out a prima facie case of discrimination with respect to his Title VII claim. See id. at 802-05. To establish a prima facie case according to the McDonnell Douglas test? the plaintiff must demonstrate that (l) he belongs to a protected class; (2) his job performance was satisfactory; (3) he was subject to an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. See Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994). Plaintiff identifies two events as adverse employment actions that violated Title VII: being passed up for over the road welding training and being placed into EAP in retaliation for complaining about not receiving this training. Plaintiff alleges no facts, however, to support any inference of discrimination with regard to these actions. While ':there is no unbending or rigid rule about what circumstances allow an inference of discrimination when there is an adverse employment decision," Chertakova v. ConneHcticut Gen. Life Ins. Co., 92 F.3d Sl, 91 (2d Cir. 1996), plaintiff cannot simply rely on the TA denying him training and placing him into a drug rehabilitation program. Rather, he must point to facts that suggest the actions were motivated, at least in part, by racial animus. Such facts include: (1) actions or remarks made by decision makers that could be viewed as reflecting discriminatory animus; (2) preferential treatment given to

employees outside the protected class; (3) in a corporate downsizing, the systematic transfer of a discharged employee's duties to other employees; or (4) a pattern of recommending the plaintiff for positions for which he is not qualified and not recommending him for positions for which he is qualified. See id. at 91-92 (citing cases).

Plaintiff has stated no such facts. Moreover, plaintiff has pointed to no facts that would refute the records offered by defendants, which show that plaintiff did not qualify for this training and that the TA placed him in EAP, in accordance with the collective bargaining agreement because plaintiff had tested positive for cocaine. To support his claim that these actions occurred under circumstances giving rise to an inference of discrimination, plaintiff offers nothing but conclusory allegations. Conclusory allegations, however, do not establish a case under Title VII. See Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir.), ert. denied, 474 IX.S. 829 (1985). Plaintiffs Title VII claim, therefore, lacks merit.

Plaintiffs Title VII claim is, therefore, dismissed.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment is granted.

So Ordered.

(signed)

JOHN GLEESON, U.S.D.J.

Dated: January 14, 1999
Brooklyn, New York